

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

September 9, 2004 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES
v. M.S. and J.S.**

**Appeal from the Circuit Court for Cannon County
No.'s 215 and 216 Royce Taylor, Judge**

No. M2003-01670-COA-R3-CV - Filed March 8, 2005

This appeal involves a dependency and neglect petition filed by the Department of Children's Services concerning the four minor children of M.S. and J.S. After the juvenile court found the children to be dependent and neglected and the victims of severe child abuse, the parents appealed to circuit court where a *de novo* adjudicatory hearing was held. The circuit court also made findings of dependency and neglect and severe child abuse and ordered that the children remain in DCS custody. Both parents appeal. Because we find there was clear and convincing evidence to support the trial court's findings, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Janet D. Powell; M. Keith Siskin, Murfreesboro, Tennessee, for the appellants, J.S. and M.S.

Paul G. Summers, Attorney General and Reporter, Douglas Earl Dimond, Senior Counsel, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

At issue are the trial court's findings that the four (4) minor children of M.S. ("Mother") and J.S. ("Father") were dependent and neglected and victims of severe child abuse.¹ The four children are: a son, J.J.S., born July 23, 1989; a son, O.S., born September 16, 1993; a daughter, A.S., born May 9, 1995; and a daughter, C.S., born February 12, 1997. The children came into the custody of

¹Initially, this case was consolidated, for purposes of argument and disposition, with Appeal No. M2003-00243-COA-R3-PT, involving the same parents' appeal of a juvenile court order terminating their parental rights. On September 17, 2004, at the suggestion of DCS, we vacated the termination order because of questions regarding the trial court's denial of appointed counsel.

the Department of Children's Services ("DCS") in February of 2000. They were ten, seven, four, and almost three years old at that time.

DCS's involvement with these children began on January 7, 2000, when a nurse practitioner, based in part on Mother's suspicions, reported potential sexual abuse of then four-year-old A.S., who had been brought to the doctor's office by Mother that afternoon. Father was the suspected abuser. DCS caseworker Joel Player interviewed Mother and A.S., accompanied them to the emergency room for further examination, contacted the Sheriff's Department, and later met with Father. Mr. Player determined that enough "red flags" were present to necessitate further investigation. Around midnight that Friday evening, Mother and Father agreed to a safety plan that would allow all the children to remain in the home with Mother pending further investigation of the allegations of sexual abuse. Under the plan, Father was to have no contact with the children and A.S. was to be taken for further physical and psychological examination.

Within a few days, the parents violated the order and took the children out of county. By January 18, Father had taken all four children out of state. The next day, January 19, 2000, DCS filed a removal petition in juvenile court asking that the children be placed in the temporary custody of DCS due to the parents' violation of the safety plan. The juvenile court issued a Protective Custody Order that day. For the next few weeks, the children were on the road and in Pennsylvania with Father. Mother assisted Mr. Player and the Pennsylvania police in locating her children, who were returned to Tennessee. The children were placed in the temporary custody of DCS pursuant to the Protective Custody Order.

A preliminary hearing on DCS's petition was held on February 11, 2000. As a result of that hearing, the juvenile court ordered that DCS retain temporary custody of the children, pending an adjudicatory hearing. An adjudicatory hearing was set, and a consent order was entered August 22, 2000. However, by order dated April 9, 2001, the juvenile court vacated the consent order, *nunc pro tunc*, because it had not been signed by the parents or their attorneys. The court set the adjudicatory hearing to begin July 11, 2001. For various causes, the multi-day hearing was held over a period of months, the last day of hearing being June 7, 2002.

During the pendency of the hearing, by order entered December 14, 2001, DCS was allowed to amend its dependency and neglect petition. The amended petition alleged as grounds for DCS custody: all four children were malnourished and not provided food and necessities of life by the parents; all four children were unkempt, filthy, and behaviorally out of control as a result of inadequate parenting; all four children were physically and emotionally abused by the parents; all four children were sexually assaulted by Father; and Mother knowingly failed to protect the children from sexual assault by Father.

On July 29, 2002, the juvenile court entered an order finding the children to be dependent and neglected and victims of severe child abuse. Parents appealed the findings to circuit court for

a *de novo* adjudicatory hearing.²

An exhaustive hearing, spanning seven days over three months, took place in the circuit court. Witnesses for DCS included DCS workers Joel Player, Donna Nichols and Melba Mooneyham. In addition, health care providers testifying for DCS were Dr. Maureen Sanger (by deposition), Sue Ross and Phyllis Thompson with Our Kids Clinic, Carol Wilson, Dr. Robin Hull, Dr. Nelson (by deposition), Dr. Michael Schmits, the psychiatrist who evaluated and oversaw treatment of J.J.S. (by deposition), Peggy Sandidge (mental health counselor) and Deborah Watlington (psychologist). Bernice Cottles, (the first foster mother), Sante Maria Miller (O.S.'s second foster mother), and Janice Ritchey (special education evaluator) also testified. The depositions of three of the children were admitted.

As for the parents' proof, Mother did not testify. Father did testify and denied all claims of abuse. Father's grown daughter, Angie M., testified that her father had never sexually abused her as a child even though she had accused him of it in a letter. Phillip Tollett, the pastor of a church the family attended for a while testified that he had never suspected abuse. Dr. Mary Huffman was qualified as an expert witness who testified about problems with the interviews of the children conducted by DCS personnel.

At the conclusion of the hearing, in addition to making thorough findings of fact and giving an explanation of its reasoning on issues raised by Parents, the circuit court found by clear and convincing evidence, that the children were dependent and neglected and had been subjected to severe child abuse.

In its final order entered June 30, 2003, the trial court found by clear and convincing evidence that the children were dependent and neglected; that both Mother and Father had committed severe child abuse as defined in Tenn. Code Ann. § 37-1-102(b)(21); that there was no less drastic alternative to removal; that reasonable efforts had been made to prevent removal and/or return the children to the home; and that continuation of the children in the parents' custody was contrary to the best interests of the children. The court ordered that custody of the children remain with DCS.

Mother and Father appeal this order. Most of the arguments raised by Mother and Father address the admissibility and sufficiency of the evidence supporting the trial court's findings. Before we reach those issues, however, we will consider issues raised regarding alleged deficiencies in prehearing matters.

²Tenn. Code Ann. § 37-1-159 governs the appeal of judgments of the juvenile court. That statute, in pertinent parts, provides that "any appeal from any final order or judgment in . . . [a] dependent and neglect proceeding . . . may be made to the circuit court" to be reviewed *de novo*. Tenn. Code Ann. § 37-1-159(a) (2001). In contrast, "all other civil matters heard by the juvenile court shall be governed by the Tennessee Rules of Appellate Procedure." Tenn. Code Ann. § 37-1-159(g).

I. EVENTS LEADING UP TO DCS CUSTODY

As discussed above, this matter was set in motion when Mother took her then four- year- old daughter, A.S., to the doctor's office in Woodbury on January 7, 2000 because the child had been complaining for several days of pain in her genital area. A.S. was seen by nurse practitioner Carol Wilson.

After taking a history and doing a visual examination, Ms. Wilson performed a urinalysis. This test revealed a large amount of leucocytes or white blood cells and a large amount of blood. Ms. Wilson concluded that A.S. had a urinary tract infection. After eliminating other usual causes of urinary tract infection through answers from Mother, and because of the amount of blood in the urine sample, Ms. Wilson suspected that abuse could have been involved.

Consequently, Ms. Wilson asked Mother whether she suspected A.S. had been sexually abused. Mother, without hesitation, stated that she suspected Father had abused A.S. Mother explained that her husband paid a lot of attention to both A.S. and her younger sister, C.S. Mother stated that Father would lie down with the girls at bedtime, sometimes for up to an hour, and that on occasion Mother had heard one of the girls cry out.³

Ms. Wilson asked A.S. whether anyone had touched her where she "pee peed." A.S. nodded yes. When specifically asked whether it was her father who had touched her, A.S. began to cry and looked at her mother. After Mother signaled permission for A.S. to answer, A.S. nodded affirmatively. Ms. Wilson called DCS to report the suspected abuse and suggested Mother take A.S. to the nearby emergency room for an examination by a doctor.

Ms. Wilson's report was referred to DCS caseworker Joel Player. He met Mother and the girls at the hospital emergency room around 5:00 p.m. He noticed at that time that the girls were extremely shy and withdrawn. Mr. Player took them to the DCS office for interviews prior to a doctor examining A.S. Mr. Player first interviewed Mother alone, and she repeated her suspicions about her husband. Mr. Player asked Mother if she had asked A.S. if anyone had touched her. Mother stated that she had and that A.S. responded with something that sounded like "yes, Daddy." Mother also told Mr. Player that A.S. had told the nurse that Father had touched her "down there."

When Mr. Player asked if any of the other children had indicated anything had happened to them, Mother recounted that a few nights earlier, when Father was putting the girls to bed, she heard C.S. say, "Ouch, beard." Father has a beard. Although she thought it was strange, Mother did not go see what was happening. Mother also mentioned Father's previous suspicious behavior with several young neighborhood girls.⁴ Mother also said that there had been earlier allegations that

³Mother said she never went to the girls' room to investigate. She told Ms. Wilson she was afraid of Father.

⁴She had observed one of the girls, an eight-year-old, in Father's lap, straddling him, with Father moving underneath her.

Father had molested his son, but that no action had resulted from the investigation.

Mr. Player next attempted to interview A.S. She, like the other children, has speech articulation problems that made communication difficult. Because A.S. was anxious and shy, Mr. Player allowed Mother to remain in the room during the interview. Throughout the interview, A.S. was withdrawn and almost totally nonverbal. When asked if anyone had given her bad touches or touched her in the private areas, A.S. shook her head “no.” When asked if she had told the doctor that someone had touched her, she nodded “yes.” She would not say who she had said had touched her.

Mr. Player then showed A.S. an anatomically correct drawing of a little girl. He asked A.S. to name different parts of the body on the drawing. Then, he asked her to point out the place that she had told the doctor she had been touched. She pointed to the genital area. He asked her who had touched her there, and she replied verbally. Mr. Player found it difficult to understand, but said it sounded like something that started with a “d.” At that point, Mother told him that A.S. had said “Daddy.” Mr. Player asked A.S. if she had said “Daddy,” and she nodded her head “yes.”

Mr. Player then showed A.S. a drawing of an adult male and stated they would say the drawing was her daddy. He asked her to point to the part of his body that he touched her with. She looked at the drawing for a few minutes, then pointed to the penis.

At this point, Mr. Player, Mother and the girls returned to the hospital, where A.S. was examined by the attending E.R. physician.⁵ Following his discussion with the doctor, Mr. Player decided that law enforcement involvement was needed. He, Mother, and the two girls drove to the sheriff’s office. Once there, a deputy sheriff interviewed Mother in the presence of Mr. Player where she reiterated her suspicions about her husband.

Around 10:00 p.m., Father was contacted and asked to come to the sheriff’s office, which he did. When the deputy explained why they had asked him to come to the office, Father denied all the allegations.⁶ Mr. Player told Father he had some concerns and they needed to address them. He told Father a number of “red flags” had come up during the investigation so far and listed those. He stated that his duty at this point was to protect the children while further investigation proceeded. He discussed with Father and then separately with Mother a plan to keep the children safe and in the home, pending further investigation. To that end, Mother and Father agreed the children would

⁵This doctor did not testify, and no report of his examination was introduced. Mr. Player was not permitted to testify about the results of the examination.

⁶Father was also asked a number of questions, including whether there had been previous allegations he had molested his son. Father acknowledged that the allegations had been made, but denied there was any truth to them. He refused to give further details. Mr. Player also asked Father about allegations he had molested an older, now adult daughter, A.S.’s half sister. He denied those allegations, saying the girl’s mother had put her up to it. They also interviewed this daughter, Angie, who had also come to the sheriff’s office. He was also asked about some of the incidents Mother had recounted as arousing her suspicions.

remain in the home with Mother, but Father would be prohibited from having any contact with the children.

With the hour approaching midnight, everyone returned to the DCS office, but Mr. Player kept Father separated from Mother and the children. He prepared a written plan of action, or safety plan, whereby Father agreed to have no contact with the children and Mother agreed not to allow any such contact and to take A.S. to Our Kids Clinic for an evaluation. After Mr. Player discussed the document with Father and then with Mother, they both signed it, and he gave them copies. He explained to them the potential consequences of violating the plan. This all occurred late Friday night.

On the following Monday, January 10, 2000, the parents violated the no contact provision of the safety plan by taking all the children out of the county. Father and Mother took A.S. to see Dr. James Nelson, a pediatrician in Dayton.⁷ Father later stated he took A.S. since she still had a fever, but also admitted that he wanted proof that A.S. had not been sexually abused. Dr. Nelson diagnosed A.S. with a urinary tract infection.

According to Dr. Nelson's later testimony, he felt "uncomfortable" about the way Father interacted with A.S. and described that interaction. At some point near the end of the examination Father disclosed to the doctor that he had been accused of sexually molesting A.S. and that he wanted a report of the doctor's findings.⁸ Dr. Nelson notified the local DCS office of the visit, and they in turn notified Mr. Player's office.

On Tuesday, January 11, Mr. Player received the message that Father and Mother had taken A.S. to a doctor in another county. Later that day he talked to Dr. Nelson, who was sufficiently concerned to have called the doctor's office where A.S. was initially seen. Also on that day, Father delivered a copy of Dr. Nelson's report to Mr. Player's office. Mr. Player contacted his supervisors about the violation of the safety plan.

The next day, Wednesday, January 12, Mother phoned Mr. Player asking about the appointment at Our Kids. Mr. Player asked Mother if she had had any problems enforcing the safety plan yet. Mother told him not to worry, that she was obeying the plan, and they had had no contact with Father. Faced with this lie, Mr. Player was very concerned about the safety of the children and convinced that the parents would not comply with the voluntary safety plan. He again contacted his supervisors about the next step. The next day his supervisor told him to obtain a court-ordered safety plan to take them through the investigation.

On Saturday, January 15, Father again took the children out of the county and was keeping

⁷The family used to live in that area, and Dr. Nelson had seen A.S. three years before.

⁸In his subsequent deposition, Dr. Nelson testified he had found no evidence of sexual abuse, but stated that in his experience, "over 90% of cases that ultimately are shown to be cases of sexual abuse, the physical exams are normal."

them at a campsite outside Dayton. Mother had gone also or had followed them, whether willingly or under coercion from Father. On Monday, January 17, 2000, Mr. Player received a call from a deputy sheriff in the Dayton area who had Mother with him. Mother told Mr. Player that Father had returned home on the 15th very upset, proclaiming his innocence and saying they had to leave. Father had taken all four children and moved to a campsite in Dayton. She said she had followed them and that Father was trying to run away with the children. Mother told Mr. Player she thought Father was guilty of the abuse allegations.

Mother also told Mr. Player that while she was attempting to call the sheriff, Father had pulled up with the kids in the van and had left. She said she did not know where Father was going, but that he might be taking the children back to Pennsylvania. After again talking with his supervisors, Mr. Player talked to a DCS attorney, who advised they should immediately seek removal of the children. The petition and affidavit were prepared. Mr. Player took them to the judge, who signed the order.

Mr. Player also went to the family's home where he encountered Mother returning. She told him that Father controlled her and that she should have told him when they prepared the safety plan that she was incapable of protecting the children from Father. She also then and later provided names of people in Pennsylvania that Father might contact.

II. REASONABLE EFFORTS

Mother and Father argue that DCS failed to use reasonable efforts to prevent removal of the children from the parents' custody as it is required to do by Tenn. Code Ann. § 37-1-166, which states:

(a) At any proceeding of a juvenile court, prior to ordering the child committed to or retained within the custody of the department of children's services, the court shall first determine whether reasonable efforts have been made to:

(1) Prevent the need for removal of the child from such child's family; or

(2) Make it possible for the child to return home.

The statute also states that the burden is on DCS to demonstrate that such reasonable efforts⁹ have been made, Tenn. Code Ann. § 37-1-166(b); describes the affidavit of reasonable efforts that must be filed by DCS, Tenn. Code Ann. § 37-1-166(c); and specifies the findings that must be made by the juvenile court when making a determination of whether reasonable efforts have been made, Tenn. Code Ann. § 37-1-166(d). In determining the reasonable efforts that are to be made with regard to a child, "the child's health and safety shall be the paramount concern." Tenn. Code Ann.

⁹"Reasonable efforts" are defined as "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1).

§ 37-1-166(g)(1).

DCS filed its petition for temporary custody alleging the children were dependent and neglected, that there were allegations of sexual abuse, and that there existed an immediate threat to their safety because the parents had violated the voluntary safety plan and the children had been removed from the jurisdiction. The petition was accompanied by an affidavit of reasonable efforts sworn to by Mr. Player.

Tennessee Code Annotated § 37-1-128(b)(2) provides that when there is probable cause to believe that a child is in need of immediate protection of the court and that the conditions in Tenn. Code Ann. § 37-1-114(a)(2) exist, the court may order the child's removal from the parents' custody pending further investigation and hearing for a period not to exceed three days. The conditions set out in Tenn. Code Ann. § 37-1-114(a)(2) are that the child:

...[i]s a neglected, dependent, or abused child, and in either case the child is subject to an immediate threat to the child's health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm, or the child may abscond or be removed from the jurisdiction of the court, and in either case, there is no less drastic alternative to removal of the child from the custody of the child's parent, guardian or legal custodian available which would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing.

If the child is not returned to the parents within three days, a hearing is to be conducted pursuant to Tenn. Code Ann. § 37-1-117(c).

The Protective Custody Order was issued and included specific findings that reasonable efforts had been made to prevent the children's removal from the home; that the children were subject to an immediate threat to their safety so that delay for a hearing could result in substantial harm, and that there was no less drastic alternative to removal that could reasonably and adequately protect the children pending a preliminary hearing.

Shortly after the children were found and taken into DCS custody, a preliminary hearing on temporary custody was held in the juvenile court on February 11, 2000. Based on that hearing, the juvenile court entered an order on February 29, 2000, finding:

. . . there is probable cause to believe that the above-named children's removal is required under Tennessee Code Annotated, Section 37-1-114(2); that there is no less drastic alternative to removal; reasonable efforts have been made to prevent removal and/or to make it possible for the children to return home; continuation of the children in the parent or legal guardian's custody is contrary to the best interest of the said children and that it is in the best interest of the said children . . . that the State of Tennessee, Department of Children's Services, retain temporary legal custody of said

children . . . pending an Adjudicatory Hearing

Parents argue that DCS should have made other efforts, or provided additional services to Mother and Father, before seeking removal of the children. They raised this issue to the trial court herein in the adjudicatory proceeding, and the trial court found:

I also find that the Department of Children's Services had no time to provide services to [Mother] based upon the fact that they had no contact with her until this was an emergency situation, in essence, only a few days before it became necessary to remove the children for their own protection.

We agree. Upon first learning of the sexual abuse allegations, the DCS caseworker, Mr. Player, fashioned a safety plan that would allow the children to remain in their home with Mother while further investigation was undertaken. Both parents agreed to the voluntary safety plan. Had this plan been followed by Parents, the emergency removal would not have been required when it was. Instead of complying with the plan, the Parents violated it within two or three days of their agreement and, less than a week after agreeing to the safety plan, Father then took the children out of state to avoid further DCS action.

Faced with the information it had at the time, DCS had no reasonable alternative to seeking the protective order and immediate custody of the children. Their health and safety was at risk, they had been removed from the jurisdiction, and the parents had not complied with the less drastic measures agreed to by DCS.

To the extent Mother and Father also argue that DCS failed to use reasonable efforts to reunify the family after the children's removal, we find DCS's actions reasonable in light of the circumstances. As DCS continued to investigate the claims of sexual abuse of A.S., the children began to exhibit sexualized behavior and to reveal abuse. A psychologist who evaluated A.S. early on recommended that Father have no contact with the children. Other mental health care professionals affirmed concern for the children's welfare if they had contact with Father. Supervised visits with Mother were arranged. DCS's first responsibility was the welfare of the children, and any analysis of the reasonableness of its actions must take into account the priority to be given to the children's health and safety. In view of the information that was being revealed by the children and the treatment they were undergoing, DCS's actions were reasonable.

III. THE PETITION

A dependency and neglect proceeding may be initiated, as it was here, by the filing of a petition. Tenn. Code Ann. § 37-1-108(4). Such a petition "may be made by any person, including a law enforcement officer, who had knowledge of the facts alleged or is informed and believes that they are true." Tenn. Code Ann. § 37-1-119.

Mother asserts that the trial court herein lacked subject matter jurisdiction because of deficiencies in the original petition. She argues the petition fails to meet the statutory requirement that it must be verified. Tenn. Code Ann. § 37-1-120. The petition was filed by DCS through its authorized representative, Joel Player. Although the petition had a space for Mr. Player to sign it, and although there is a notarized oath whereby Mr. Player was to swear as to the truth and accuracy of the facts set out in the petition, Mr. Player did not sign the petition itself. However, Mr. Player signed the DCS attorney's name, with permission, and wrote his initials after the "by permission."¹⁰ Mr. Player testified about the preparation and filing of the petition.

In addition, Mr. Player also filed contemporaneously an Affidavit of Reasonable Efforts wherein he affirmed under oath the facts set out in the petition. Those facts included the allegations of sexual abuse, the voluntary safety plan that was to allow the children to remain home pending further investigation, the parents' actions in taking the children to another county, and the likelihood of Father absconding with them out of state. The affidavit stated that removal of the children was necessary to protect them from abuse. The Tennessee Rules of Civil Procedure provide that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit," Tenn. R. Civ. P. 11.01, thus equating verification of the pleading with attachment of a affidavit. We find the simultaneously filed affidavit sufficient verification to meet the statutory requirement of a verified petition.

Additionally, while the Protective Custody Order was based on the petition and affidavit, it merely authorized the initial removal from the parents' custody. Continued temporary custody was authorized by the order resulting from the preliminary hearing held in accordance with Tenn. Code Ann. § 37-1-117 shortly after the children were brought back to Tennessee and placed in DCS's custody. The order from that hearing reflects the parties were before the court, and the order was signed by counsel for Parents. As a result of that hearing, the court determined that temporary custody should remain with DCS. Thus, any deficiencies in the petition regarding the verification of facts recited therein were cured, or could have been cured, by testimony at the hearing.

The time to raise the challenges to the petition was at the preliminary hearing that resulted in the award of temporary custody to DCS. *See Department of Human Services v. Gouvitsa*, 735 S.W.2d 452, 458 (Tenn. Ct. App. 1987) (holding that any alleged deficiency in the petition was harmless error because the father did not assert he was unaware of the details of the allegations of sexual abuse or that he was prejudiced by the lack of a statement of specific details and did nothing to require a more specific statement). *See also* Tenn. R. Civ. P. 11.01 ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly *after being called to the attention of the attorney or party*") (emphasis added).

¹⁰Mother has also argued that the petition failed to comply with the requirement of Tenn. R. Civ. P. 11.01 that every pleading of a represented party be signed by the party's attorney. Because DCS is a separate legal entity and was the petitioner, Mother argues the petition had to be signed by an attorney, not Mr. Player. While Mr. Player did not sign the petition, he signed the attorney's name "by permission." There is no allegation or proof that the attorney did not give her permission, was not familiar with the contents, or did not comply with her obligations under Rule 11. The petition is not subject to challenge on this ground.

The petition was amended well before the conclusion of the juvenile court proceedings and, consequently, well before the circuit court proceedings herein. The record does not reflect any objection to the petition at that time or any time previously. The circuit court proceedings were based on the amended petition, which did not suffer the defects of the original. Consequently, we find the arguments regarding the sufficiency of the original petition to be without merit.

IV. DEPENDENCY AND NEGLECT AND SEVERE CHILD ABUSE

Tenn. Code Ann. § 37-1-102(b)(12)(G) defines a dependent and neglected child as one “[w]ho is suffering from abuse or neglect.”¹¹ In that context, abuse exists when a child “is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect, or other actions or inactions of a parent, relative, guardian, or caretaker.” Tenn. Code Ann. § 37-1-102(b)(1). “Neglect” is not statutorily defined, but it has an ordinary and commonly understood meaning.

The adjudicatory hearing herein was held pursuant to Tenn. Code Ann. § 37-1-129, which provides in pertinent part that after hearing the evidence on the petition, the court shall make and file its findings as to whether the child is a dependent or neglected child. Tenn. Code Ann. § 37-1-129(a). If the court finds from clear and convincing evidence that the child is dependent or neglected, it may make any of the dispositions set out in Tenn. Code Ann. § 37-1-130, including committing custody of the child to DCS. Tenn. Code Ann. § 37-1-129(c). In addition,

If the petition alleged the child was dependent and neglected as defined in § 37-1-102(b)(12)(G), or if the court so finds regardless of the grounds alleged in the petition, the court shall determine whether the parents or either of them or another person who had custody of the child committed severe child abuse.

Tenn. Code Ann. § 37-1-129(a)(2). The court must make written findings of fact on that issue. *Id.* “Severe child abuse” is defined, in pertinent part, as:

(A) The knowing exposure of a child to or the knowing failure to protect a child from abuse or neglect that is likely to cause great bodily harm or death and the knowing use of force on a child that is likely to cause great bodily harm or death;

(B) Specific brutality, abuse or neglect towards a child which in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay

¹¹The primary purpose of a dependent-neglect proceeding is to provide for the care and protection of children whose parents are unable or unwilling to care for them. Dependent-neglect proceedings, as distinguished from termination proceedings, are intended to be procedurally informal and evidentiary rules are relaxed, at least in juvenile courts. *See In re M.J.B.*, No. M2003-01167-COA-R3-PT, 2004 WL 769252 at *5 (Tenn. Ct. App. April 8, 2004) (perm. app. denied July 12, 2004).

or retardation, or severe impairment of the child's ability to function adequately in the child's environment, and the knowing failure to protect a child from such conduct;

(C) The commission of any act towards the child prohibited by §§ 39-13-502 - 39-13-504 [rape, aggravated rape, and aggravated sexual battery], 39-13-522 [rape of a child], 39-15-302[incest], and 39-17-1005[especially aggravated sexual exploitation of a minor] or the knowing failure to protect the child from the commission of any such act towards the child.

Tenn. Code Ann. § 37-1-102(b)(21).

A finding of severe abuse triggers other statutory provisions, including a prohibition on returning the child to the home of any person who engaged in or knowingly permitted the abuse absent consideration of various reports and recommendations. Tenn. Code Ann. § 37-1-130(c). Even with such consideration,

No child who has been found to be a victim of severe child abuse shall be returned to such custody at any time unless the court finds on the basis of clear and convincing evidence that the child will be provided a safe home free from further such brutality and abuse.

Tenn. Code Ann. § 37-1-130(d). Further, Tenn. Code Ann. § 37-1-166(g)(4)(A) provides that reasonable efforts to reunify a family are not required to be made if a court has determined that a parent has subjected the child or a sibling to severe child abuse.

The most serious consequence of a finding that a parent has committed severe child abuse is that such a finding, in and of itself, constitutes a ground for termination of parental rights. Tenn. Code Ann. § 36-1-113(g)(4)(“the parent or guardian has been found to have committed severe child abuse as defined in § 37-1-102, under any prior order of a court.”) The ground itself is proved by a prior court order finding severe child abuse, and the issue of whether abuse occurred is not re-litigated at the termination hearing.

By statute, in a termination of parental rights case, both grounds and best interest must be proved by clear and convincing evidence. Tenn. Code Ann. § 36-6-113(4); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The same is true for a finding of dependency and neglect, Tenn. Code Ann. § 37-1-129(c), and even a finding that a victim of severe child abuse can be returned home, Tenn. Code Ann. § 37-1-130(d). However, there is no statutory requirement that severe child abuse must be shown by clear and convincing evidence. Nonetheless, because of the consequences of such a finding, we conclude that the clear and convincing standard must be applied.

Clear and convincing evidence should produce in the fact-finder's mind a firm belief or conviction as to the truth of the facts sought to be established; it should demonstrate that the truth

of the facts asserted is “highly probable.” *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2002).

Both Mother and Father challenge the sufficiency of the evidence to support the trial court’s finding that the children were dependent and neglected and the finding that the parents had committed severe child abuse. Mother also challenges the finding that she failed to protect the children from Father’s abuse.

V. EVIDENCE

The trial court made a number of specific findings of fact which are all supported by the evidence in the record. The court also explained which witnesses or testimony it found more persuasive and credible. It is clear the trial court gave a great deal of thought to the issues raised in this case and carefully analyzed all the evidence. Our review of all the evidence leads us to the same conclusion as that reached by the trial court. DCS has shown by clear and convincing evidence that these children were dependent and neglected and were the victims of severe abuse inflicted by their parents. The children, through their statements and actions, paint a picture of a home environment that was horrific and almost unimaginable.

The family moved often. Father testified that he came to Tennessee in search of a religious community that would approve his marrying Mother even though he was divorced. At that time, Mother and Father already had one child. Father first met Mother when she was only ten years old; it is not clear when their romantic relationship began. Father was considerably older than Mother. After coming to Tennessee, there was a period of two years when they lived in the woods without electricity or running water. The children exhibited signs that they had been largely isolated from other people. They were initially shy and anxious around new people, were not socialized, and indicated they spent little time outside the family unit. The parents home-schooled the children at times.

After the children were returned to Tennessee and DCS was given custody of them, they were placed with Ms. Bernice Cottles for foster care on February 8, 2000. At that time the oldest, J.J.S., was ten years old, and the youngest, C.S. was three years old. The girls were still in that foster home at the time of trial, and the boys had spent five months there. Prior to this placement, the children had been in the custody, and under the care, of their parents.

A number of witnesses testified that the children were underweight and malnourished; they were unkempt or underdressed; they did not behave appropriately for their ages; and they had serious problems with delayed speech articulation. Janet Ritchey, a special education evaluator who worked with J.J.S. for a short time while he was enrolled in school for six weeks before he was placed in foster care, testified that J.J.S. was very small for his age (such that when she first observed him, she did not know he was ten) and looked malnourished. As a ten-year old, he should have been in either the 4th or 5th grade, but was in 3rd grade. J.J.S. was unruly and crawled around on the floor. When Mother came to pick him up once with the girls, the girls were barefoot and wearing only thin dresses even though it was very cold.

Ms. Wilson, the nurse who first examined A.S., testified that the two girls were dirty, their clothes were dirty, and their hair was matted. Both girls were nonverbal during the entire time they were in the doctor's office; neither uttered a word. Ms. Wilson described their behavior as unusually overly active, stating they constantly moved about, jumping from one place to another, pulling things out of cabinets, running their hands up the walls, etc.

Sue Ross, a pediatric nurse at Our Kids Center, conducted a physical examination of all the children in early March 2000, two or three weeks after their placement in foster care. She found J.J.S. to be malnourished and dramatically underweight with muscle wasting having occurred. Dr. Schmits, a psychiatrist who examined J.J.S. in July of 2000, also diagnosed him as having suffered past malnutrition with muscle wasting.

Ms. Cottles's testimony confirms that of the health care professionals. When the children first came to her, she noticed they were all thin, or malnourished, especially J.J.S. Because they were underweight, the children were put on supplements for weight gain and to build muscles. By the fourth month in Ms. Cottles's care, C.S. had gained fifteen pounds; A.S. seventeen pounds; O.S. ten pounds, and J.J.S. fifteen pounds. When the children first arrived at their foster home, they would gorge themselves at meals and would hoard food, sticking it in their pockets. The gorging and hoarding tapered off after a few weeks of regular meals with enough for all.¹²

When the children came into DCS custody, they also had vision problems, which were diagnosed after Ms. Cottles noticed the children fell often and suspected they could not see well. They told her they had never had an eye examination. All the children were prescribed eyeglasses. When the children first arrived, Ms. Cottles found the children to be very delayed regarding basic hygiene. None could bathe themselves, or feed themselves very well, nor were they toilet trained.¹³ They did not demonstrate knowledge of social behavior appropriate to their ages.

Almost all the witnesses who dealt with the children testified that the children had speech articulation problems, a developmental delay. Ms. Cottles originally had difficulty understanding the children because of the speech problems. The youngest child, C.S., had the least severe impediment and acted as interpreter for her brothers and sister at first. Ms. Cottles grew to understand all the children's speech patterns.

Ms. Cottles described the children as being terribly shy and skittish when they first came to her home. She explained that she has a habit of talking with her hands and that at first the children were "always dodging me" as if they thought she was going to hit them. O.S.'s second foster mother noticed similar behavior in O.S., showing great fear of adult hand motions.

¹²The children told Ms. Cottles that their father had eaten steak almost every night, and they were curious about what steak tasted like.

¹³All the children used the floor as their toilet. Eventually, Ms. Cottles had to have the carpet replaced. Although there was improvement in this area, following supervised visits with their mother, all the children would start having accidents again.

After a while, the children began to tell Ms. Cottles, and later other adults who treated or helped them, stories of physical abuse. Their father beat them with boards or sticks. Father testified that he and Mother believed in the biblical concept of corporal punishment. Both J.J.S. and O.S. related an incident when Father beat J.J.S. with a board and kicked O.S. off the porch, causing O.S. to cut his leg on a nail. Both had scars from this incident or similar beatings. The children told of serious beatings for soiling their pants. J.J.S. stated that his father accused Mother of not whipping him hard enough, so she started using a belt and hitting him harder. O.S. told of one instance when the children were sleeping, Father slammed the door open, told them he was the devil, and beat them all. The beatings by the parents were regular and frequent.

With regard to sexual abuse, the most compelling evidence came from statements made by the children and from their highly sexualized behavior. Their explanations after an incident of such behavior showed they did not know it was unusual or unacceptable. Their stories of sexual abuse by their parents slowly emerged. When the children were initially placed with Ms. Cottles, she was not told anything about the allegations of sexual abuse of A.S. She was given no information that would cause her to suspect potential abuse. The trial court found Ms. Cottles to be unbiased and credible. Her testimony regarding the children's statements to her and the children's behaviors she observed was powerful and chilling.

Several weeks after the children came to live with Ms. Cottles, A.S. told Ms. Cottles that Father had put a stick and his finger in her and it hurt badly. About a month after the children came to live with her, Ms. Cottles found 10 year old J.J.S. simulating intercourse with a stuffed animal. When Ms. Cottles explained such behavior was unacceptable, he did not understand and asked, "why, we always did it at home?" He also tearfully told Ms. Cottles that his father had regularly made him do those things. He told her that Father would hold him face down on the bed when he screamed and would always put a stick up his "butt."

Weeks after their arrival, Ms. Cottles took the children to her church for a puppet show. After the lights were turned off and the music had begun, she glanced over at the children. All four children had stripped to their underwear and were touching themselves. When questioned about this, the children stated it was what they did at home every night when the Christian music was played.

Later, J.J.S. revealed other sexual acts his father forced him to perform on Father, himself, and his sisters. He also told Ms. Cottles that, after himself, Father assaulted A.S. the most frequently. When asked if he tried to help his sister, he stated if Father "was doing her, he wasn't doing me." At another time, and alone, 6 year old O.S. independently told of sexual acts his father forced him to perform. Both included specific details.

C.S., the youngest, seemed to have been abused the least. She was described as very intelligent, even though very young. C.S. told Ms. Cottles she knew what Father was doing to her brothers and sisters, but just could not do anything to stop it.

In their own words, each of the children revealed sexual abuse by Father, including anal and

vaginal rape, penetration with objects, oral stimulation of Father, and requiring them to sexually assault their siblings. In their telling of various incidents, the children would sometimes place Mother in another room and sometimes in the room where the abuse was occurring. The three older ones also stated there were times Mother held them down while Father abused them.

Especially chilling was J.J.S.'s explanation to Ms. Cottles as to why he continued to soil his pants. He confided to Ms. Cottles that his mother had suggested that he soil himself so his father would not want to sexually assault him. J.J.S. stated that his father would beat him badly for soiling his pants, but that he always got a beating after being sexually assaulted since he cried, so he thought the beating alone was preferable to a beating and the sexual assault.

As for A.S.'s behavior, Ms. Cottles reported observing A.S. masturbating, trying to put things in her vagina, and trying to put things in her younger sister's vagina. On one occasion, A.S. pulled down her pants and told her foster mother that her father did things to her "pee-pee" and her bottom and that it hurt. Because of A.S.'s behavior, Ms. Cottles had to speak to her about not going up to strange men and rubbing and touching them in inappropriate places.

In March 2000, A.S. was referred to Our Kids Clinic, which specializes in providing medical and psychological evaluations for children when there are concerns about abuse. Psychologist Margaret Sanger interviewed A.S. twice. She found A.S.'s highly sexualized behaviors were not typical for a child that age and were red flags that A.S. had either been abused or witnessed abuse. Accordingly she recommended that Father have no contact with the children and also recommended he undergo a psychosexual evaluation.

In October 2000, both the girls were seen by Robin Hull, a child development specialist for Cumberland Mountain Mental Health Center, which provides outpatient counseling for alleged sexual abuse. At that time, the girls, then six and three respectively, were masturbating and defecating and urinating on themselves. Ms. Hull provided services for the girls for the next eight months. During several sessions, A.S. expressed her anger at her mother for letting her father touch her private parts. She also described how her mother held her down while her father abused her. Apparently, C.S. also told of abuse, but she was not questioned closely about these statements.¹⁴

According to Ms. Cottles, during the summer of 2000, J.J.S. changed for the worse almost overnight and began to hear voices and talked about killing the family cat and mutilating himself.¹⁵ Around this time, both the boys assaulted their youngest sister C.S. by burning her with a cigarette lighter and then sexually assaulting her with a stick. J.J.S. was placed in the acute care unit at Cumberland Hall Hospital in July of 2000 for several weeks and then placed in its residential treatment program. While there Dr. Michael Schmits, a psychiatrist, evaluated J.J.S. He diagnosed

¹⁴C.S. reported touching by Father and other relatives. These sessions were not conducted individually, so Ms. Hull conceded C.S. may have been influenced by her older sister.

¹⁵Ms. Cottles caught J.J.S. sexually abusing her small dog on more than one occasion.

J.J.S. as suffering from psychotic disorder with hallucination, severe developmental delay, past malnutrition, severe environmental stressors from family relationships, and low functioning.

Dr. Schmits later testified by deposition that J.J.S. told him and other therapists that Father had sexually abused him. Dr. Schmits testified that the abuse J.J.S. described would reasonably be expected to produce severe mental health problems, including psychosis, neurotic disorder, severe developmental delays, and inability to function. With regard to J.J.S.'s statements and his beliefs, Dr. Schmits testified that J.J.S. reported Father's sexual abuse and did not want to be around Father and J.J.S. told Dr. Schmits that Mother could have stopped the abuse. Further:

. . . he was fearful of being around the father, and fearful that mother would not protect him from the father. So he was mad at dad for the direct abuse and he was mad at mom indirectly for not being a protector.

The psychiatrist's prognosis for J.J.S. was guarded because J.J.S. had had a psychotic experience, he would have difficulty relating to and trusting people in the future, and he had developmental delays and other impediments that would put him at a disadvantage with his peer group. He needed a safe environment, without abuse, in which to build trust and feel secure in order for him to be able to function. He needed additional educational services to make up for earlier deficiencies in his education. He was at risk to act out some of the abuse he suffered on others and would most likely need mental health services the rest of his life.

J.J.S. also told Peggy Sandidge, a counselor who worked with him during his hospitalization, about sexual abuse by his father. He also started exhibiting behaviors that copied abusive acts that had happened to him. Ms. Sandidge, who was trained and experienced in dealing with victims of alleged sexual abuse, testified she got no impression that J.J.S. had been coached. She also testified that children who have been sexually abused and who repeat this conduct in public say that the conduct is acceptable because they did it at home. J.J.S. expressed the same belief to Ms. Sandidge.

In August of 2000, O.S. was also removed from Ms. Cottles's home after a psychological examination. He was placed with therapeutic foster parent Sante Maria Miller. She explained that O.S. was constantly masturbating when he came to live with her and that he was terribly afraid of adult hand motions. After living with Ms. Miller for over a year, O.S. confided to her that he had been physically and sexually abused by his father.¹⁶ Like his older brother and younger sister, he recalled how his mother held him down for his father to sexually assault him. He was very angry toward his mother.

¹⁶There is no need to recite in graphic detail the statements made by O.S. or to go into greater detail as to statements by the other children.

Throughout the children's placement with DCS, Donna Nichols has been their caseworker. Ms. Nichols recounted the numerous conflicting statements Mother made during these two years. According to Ms. Nichols, Mother would tell her at times that she was glad the children were safe and in foster care. She spoke of them living for two years with no electricity or running water and of being a victim of domestic violence. Mother would tell Ms. Nichols she was through with her husband and knew he had abused her children, but then would turn around and defend him the next time she spoke to her, denying that any abuse occurred. Indeed, Mother eventually divorced Father, but she later allowed him to live with her sporadically.

Mother's visits with the children were always supervised and often problematic, according to both Donna Nichols and Ms. Cottles. Mother would often say inappropriate things indicating it was the work of the devil that they were in foster care and that if they prayed harder they would be able to come home. This talk about returning home frightened the children, and Ms. Cottles described how difficult it often was to deal with the children following a visit with their mother.

At the conclusion of the hearing, the trial court found there was clear and convincing evidence that the children were dependent and neglected and specifically found: that the children had been malnourished; that the effects of the malnourishment was clear to all the health care workers who dealt with the children, especially J.J.S.; and that Ms. Cottles observed the underweight condition of the children, stating that the baby's ribs could be seen when the child was first placed with her, as well as the overeating and hoarding of food; and that the children gained weight after being placed in foster care.

The court also found that there was clear and convincing evidence that the children were the victims of severe child abuse in that the children had been sexually abused by Father and that Mother failed to protect the children from the sexual abuse. The court found persuasive testimony recounting statements that included specificity of detail and the fact that the statements were consistent though made to different people over time. In addition, the court relied on Ms. Cottles's testimony regarding the children's behaviors, stating, "obviously, the actions of the children speak louder than the statements they made or the findings of the health professionals. Those simply seem to corroborate what the children are acting out."

After a thorough review of the record in this case, we conclude that the evidence of neglect is clear and essentially undisputed. These children were deprived of necessities for their growth and development and of appropriate care, nurturing, and training. We, like the trial court, find there was clear and convincing evidence that the children were dependent and neglected.

We also find that there was clear and convincing evidence that the children were victims of severe child abuse perpetrated by their parents or perpetrated primarily by Father with Mother failing

to protect the children.¹⁷ The evidence of physical abuse in the form of frequent and severe beatings is essentially un rebutted. As to sexual abuse, the statements made by the children, independently and in various settings, describing acts committed on them were detailed and consistent. The sexualized behaviors they exhibited were consistent with those statements. It is inconceivable that these detailed statements and explicit behaviors were the product of anything other than direct experience as victims and observers of sexual abuse.

We, like the trial court, base our conclusion primarily upon testimony regarding the statements of the children and testimony regarding their behaviors. Parents assert that that testimony, or portions of it, should not have been admitted or considered. If they are correct in these assertions, whether severe child abuse was shown by clear and convincing evidence is called into serious question. Consequently, we must consider each of the challenges to the evidence.

VI. STATEMENTS OF THE CHILDREN

Parents assert that the trial court erred in admitting hearsay statements of the children because the statements were not trustworthy. Tenn. R. Evid. 803(25) provides a hearsay exception for statements about abuse or neglect by a child alleged to be the victim in certain civil proceedings:

Unless the circumstances indicate lack of trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(10), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(19), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147(d).

In determining the trustworthiness of such statements, the Advisory Commission Comments to Rule 803(25) suggest that the trial court should consider the motivation of the minor declarants, the motivation of adults to influence them, and the presence or absence of evidence corroborating the statements. “As with all hearsay offered at trial, balancing under Rule 403 is appropriate.”

Generally, a trial court's ruling on the admissibility of evidence is within the sound discretion of the trial judge. Trial courts are accorded a wide degree of latitude in their determination of

¹⁷Mother makes a separate argument that her rights should not be terminated because the evidence shows that she was not able to protect the children. The trial court found, “Obviously, [Mother] was under dominion and control of [Father] and afraid of him, but I don’t find that that excuses her actions in not protecting the children.” Whether dominion and control were proved is subject to debate, although we do not doubt that Father exerted a great deal of influence over Mother and that she was afraid of him. Nonetheless, we agree with the trial court that Mother did not prove circumstances justifying her failure to protect the children from the abuse inflicted by Father. There was testimony that she also beat the children and that she helped Father sexually abuse the children. The weight of the evidence shows that she certainly had knowledge of the abuse by Father. As our Supreme Court has said, “Allowing a child to be abused is egregious abuse.” *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 176 (Tenn. 1996). We conclude that there was clear and convincing evidence that Mother committed severe abuse and/or failed to protect her children from frequent, consistent, and regular abuse by Father.

whether to admit or exclude evidence, and will be overturned on appeal only upon a showing of abuse of discretion. *Rothstein v. Orange Grove Center, Inc.*, 60 S.W.3d 807, 811 (Tenn. 2001); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). Whether to admit a child's statement of sexual abuse as a hearsay exception is within the discretion of the trial court. *State v. Purcell*, 955 S.W.2d 697, 609 (Tenn. Ct. App. 1997).

The children made statements to various adults who testified about those statements at trial: their foster mothers, counselors, DCS caseworkers, and mental and physical health professionals who treated them. The parents argue these hearsay statements were not trustworthy on several bases.

The first involves interviews by two DCS workers: Joel Player's initial interview with A.S. and Melba Mooneyham's taped interviews with three of the children in July, 2000. Parents assert that these interviews were carried out in a suggestive and leading manner. Consequently, they argue, (1) the children's statements made during those interviews were untrustworthy and should not have been admitted into evidence and (2) the children's statements to others were so tainted by the interviews they were not trustworthy, essentially arguing that the interrogations implanted thoughts and beliefs in the children's minds.

Dr. Mary Huffman was qualified as an expert witness who testified that the interviews conducted by Mr. Player and Ms. Mooneyham of A.S. and the other children were "problematic" since the interviews were leading and the questions posed were suggestive. Dr. Huffman testified she was unable to determine what actually happened to the children since children can come to believe "false truths." While the trial court agreed with Dr. Huffman that much of the questioning by Mr. Player was improper, the trial court found the actions of the children were totally consistent with their statements of abuse and therefore he concluded "I don't find that they have had anything implanted by the State."

In its final order finding severe abuse, the trial court did not rely on statements made by the children during either of the interviews. The court discussed the evidence it relied on or found convincing, and neither of the interviews was mentioned. Therefore, the question is whether later statements by the children made in other settings were affected by the interviews.

Mr. Player was the DCS caseworker who had the first contact with this family. He interviewed then-four-year-old A.S., with her mother present, based on statements Mother and the child had made to the nurse. He did not interview any of the other children. A.S., along with her siblings, were placed in foster care within a few weeks of this interview. There is no evidence and no reason to believe there was any connection between this interview and the other children's statements. Further, nothing about this interview could have implanted the kinds of detailed descriptions of serious and frequent sexual abuse given by A.S. and the other children. Finally, we note that the trial court accredited the testimony of Ms. Wilson, and her interaction with Mother and A.S. occurred before either of the challenged interviews.

Ms. Mooneyham interviewed all the children except J.J.S., who had just been removed from

the initial foster home. These interviews took place in July, 2000, months after the children had been placed in Ms. Cottles's foster home and, therefore, after the children had made statements incriminating their parents to their foster mother and others. Parents cannot explain how the July interviews could have tainted prior statements by the children.

These children repeatedly made statements to Ms. Cottles and others that were detailed descriptions of specific actions by Father and Mother that went way beyond the touching that A.S. initially reported and that Mr. Player asked her about. Additionally, the highly sexualized behavior of the children, and the specific acts they committed, have no discernible connection to the questions asked in the interviews. Like the trial court, we cannot conclude that the interviews tainted, implanted, or suggested ideas for the statements or behavior by the children.

Parents further argue that the children's statements were untrustworthy due to the children's speech articulation difficulties. It is true the children's speech was delayed, with the youngest child, C.S., having the least severe problem, and this delay hampered interviews. However, several witnesses, including Ms. Cottles, testified that, after some time with the children, it was easier to understand them. Dr. Schmits, who treated J.J.S. after his admission to the psychiatric hospital, was clear that it was possible to understand and communicate with J.J.S. and that J.J.S.'s speech improved during his stay. Dr. Sanger, who interviewed A.S. only twice for evaluation and diagnostic purposes, testified that she did not understand many of A.S.'s responses, but that she did not record in notes or otherwise rely on statements she did not clearly understand. Other witnesses who dealt with the children over a longer period of time found it possible to understand them. Parents fail to point out any particular instance of miscommunication or to explain the consistency of understanding by different people as to the principal events and pattern of treatment by the parents.

Parents also insist that J.J.S.'s statements are particularly untrustworthy due to his psychiatric condition. In July of 2000, he was evaluated by a crisis response team and admitted to Cumberland Hall, where Dr. Schmits, a psychiatrist, did the admission evaluation, saw J.J.S. almost daily in acute care, and then oversaw his treatment in residential placement, until he was discharged in November of 2000. At the time of admission, J.J.S. was diagnosed with psychotic disorder and post traumatic stress disorder. He reported auditory hallucinations at times, some visual hallucinations, and nightmares, usually consisting of animals threatening to hurt, cut, eat, or burn him. During these episodes, he was considered out of touch with reality. By the time he was discharged, after treatment that included antipsychotic medication, the hallucinations had decreased in frequency and stopped altogether. J.J.S. "appeared to stabilize appropriately." The evidence indicates J.J.S. had a "psychotic experience," in Dr. Schmits's words, but no longer suffered from the sensory misperceptions that caused his admission.

Dr. Schmits reported that J.J.S.'s memory appeared to be intact. The doctor reported in a generalized way some of the statements J.J.S. made during his stay at Cumberland Hall regarding abuse by his father and his mother's knowledge and failure to protect him. Dr. Schmits connected J.J.S.'s prior abuse to his psychiatric problems and his lack of trust. The psychiatrist was not concerned that J.J.S.'s psychiatric state made his statements about abuse unbelievable or

untrustworthy.

Dr. Schmits also clearly and affirmatively stated that J.J.S. was afraid of his father and was in fear of his safety when he was around him. He was also angry with his mother. J.J.S. believed his father had abused him and believed his mother had knowingly allowed the abuse to happen. Dr. Schmits testified it was not probable that stressors had caused J.J.S. to imagine things that might not have actually happened. Dr. Schmits also stated it was not probable that J.J.S. had not been sexually abused because J.J.S. talked about it.

One of the definitions of severe child abuse is “specific brutality, abuse or neglect towards a child which in the opinion of qualified experts has caused or will reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delay or retardation, or severe impairment of the child’s ability to function adequately in the child’s environment, and the knowing failure to protect a child from such conduct.” Tenn. Code Ann. § 37-1-102(b)(21)(B). Dr. Schmits opined that the abuse J.J.S. recounted was the cause of his mental health problems as well as the other conditions he described. We do not believe that because the atrocities inflicted on this child had the result anticipated by the statute, the courts are precluded from hearing his statements about what happened to him, absent proof that those statements were affected by, the result of, or made only during his episode of psychosis. No such evidence was presented here.

Additionally, J.J.S. had made explicit and detailed statements about his treatment by Mother and Father, as well as engaged in unusual and highly sexualized behavior, months before this psychotic episode. His statements to Ms. Cottles and others were consistent with each other and with statements he made while hospitalized, and they are corroborated by the statements of his younger brother and sisters.¹⁸

Based on the record and application of the factors set out in the Advisory Committee Comments to Tenn. R. Evid. 803(25), we agree with the trial court’s decision to admit the hearsay evidence of the children’s statements. The trial court weighed the evidence from the various witnesses, citing the credibility of specific witnesses. The court found “the most reliable statements are the ones that [the children] made to Ms. Cottles.” When the children came to her home, Ms. Cottles was unaware of the allegations of possible sexual abuse. The children found themselves, probably for the first time in their lives, in a home where they were fed regularly, cared for, and nurtured. Ms. Cottles apparently earned the children’s trust, and they in turn both acted out their past life for her and told her in their limited language what their life had been like with their parents.

There is no evidence that any adult around the children was motivated to induce the children to false testimony. There is also nothing in this record to suggest any motivation on the part of the

¹⁸The trial court stated, “I have a problem with his statements, obviously he has had hallucinations and problems, but it is hard for me to overcome the fact that these statements have been consistent through various people.”

children to invent their stories of abuse. We find the children's statements to be trustworthy and find that the trial court did not abuse its discretion in admitting the children's statements under Tenn. R. Evid. 803(25).

VII. EXPERT TESTIMONY

Parents insist that the trial court erred in admitting into evidence part or all of the deposition testimony of Drs. Schmits and Sanger. Relying on *State v. Ballard*, 855 S.W. 2d 557 (Tenn. 1993), they assert that the testimony of these mental health professionals regarding the behavior of the children was inadmissible.

In general, questions regarding admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. *State v. Coley*, 32 S.W.3d 831, 833 (Tenn. 2000); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997). The trial court has broad discretion regarding the admission of expert testimony. *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002); *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or is abused. *Stevens*, 78 S.W.3d at 832; *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997). A finding of abuse of discretion is proper when the trial court applied an incorrect legal standard¹⁹ or reached a decision against logic or reasoning that caused an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Coley*, 32 S.W.3d at 833; *Stevens*, 78 S.W.3d at 832.

Obviously, admission of evidence that the Tennessee Supreme Court has held is categorically inadmissible would be subject to reversal. Parents argue that *Ballard* holds that the admission of expert testimony concerning symptoms of post-traumatic stress syndrome in a child sexual abuse case is reversible error. They argue that some testimony in Dr. Schmits's deposition and in Dr. Sanger's deposition violate *Ballard* because it describes behavior of the children.

¹⁹The admissibility of expert testimony is generally governed by Tenn. R. Evid. 701-706. *Coley*, 32 S.W.3d at 833. Expert testimony regarding scientific theory or based on technical or specialized knowledge must be both relevant and reliable to be admissible. Tenn. R. Evid. 702 & 703; *Stevens*, 78 S.W.3d at 832-33. The primary inquiry under the rules is whether the expert opinion testimony will substantially assist the trier of fact to understand the evidence or to determine a fact in issue. Tenn. R. Evid. 702. The trial court is required to determine whether the expert evidence is reliable or valid. *Van Tran v. State*, 66 S.W.3d 790, 819 (Tenn. 2001); *State v. Farner*, 66 S.W.3d 188, 207 (Tenn. 2001). One purpose of this examination is for the court to assure itself that the opinions of the expert "are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." *Farner*, 66 S.W.2d at 207-208, quoting *McDaniel*, 955 S.W.2d at 265. Among the nondeterminative and nonexclusive factors that can be considered in determining reliability are (1) whether the scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. *Stevens*, 78 S.W.3d at 832, 835; *McDaniel*, 955 S.W.2d at 265.

In *Ballard*, the expert witness testified as to the symptoms²⁰ exhibited generally by victims of child sexual abuse and also testified that the children who were alleged to have been abused by the defendant in that case exhibited those symptoms. The expert stated “that all four children exhibited ‘symptom constellations’ consistent with post-traumatic stress syndrome and that, in his opinion, the ‘stressor’ precipitating the syndrome in the children was sexual abuse.” 855 S.W.2d at 561. He listed some of the behavioral traits attributable to the children that were the basis of his opinion, including bed-wetting, clinging, fear, irritability, nightmares, anxiety and discipline problems.

The Court held that the admission of expert testimony concerning the symptoms of post-traumatic stress syndrome to be reversible error based on two grounds. First, “in the context of a criminal trial,” there is a danger that the jury will be unduly influenced by expert testimony because of its special “aura.” 855 S.W.2d at 561. The testimony at issue regarding general behavior traits of sexually abused children could lead a jury to “abandon its responsibility as a fact finder” and conclude, based on the expert testimony, that if children exhibit behavior consistent with a group of symptoms induced by sexual abuse, then it is more likely that the defendant committed the crime. *Id.*

The Court held that “[t]estimony that children exhibit symptoms or characteristics of post-traumatic stress syndrome should not suffice to confirm the fact of sexual abuse.” 855 S.W.2d at 561. The symptoms of such a syndrome do not clearly identify the perpetrator of a crime and, consequently, evidence of this type invades the province of the jury to determine credibility. *Id.*

Second, the Court found that there was no consensus in the psychological community as to the reliability of a psychological profile to determine abuse, stating “expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to ‘substantially assist’ a jury in an inquiry of whether the crime of child sexual abuse has taken place.” 855 S.W.2d at 562. The Court found that the medical community did not agree that any one group of symptoms provided a reliable indication that sexual abuse had occurred. 855 S.W.2d at 562. “A dysfunctional behavioral profile may be brought on by any number of stressful experiences, albeit, including sexual abuse.” *Id.* The list of symptoms described by the expert was too generic and could be the result of other stress causing incidents, including “the turbulence of growing up.” *Id.*

The problem that *Ballard* addressed was the connection between general symptoms exhibited by sexual abuse victims, as well as by victims of other kinds of trauma, and the conclusion that someone exhibiting those symptoms must have been sexually abused by the defendant. As the Court of Criminal Appeals later explained, *Ballard* and later cases on the issue, taken collectively, “establish a relatively clear rule of law: child sex abuse may not be proven by evidence that the victim exhibited residual characteristics or behavioral traits similar to other victims of such abuse.”

²⁰Although the expert labeled those symptoms post-traumatic stress syndrome brought on by sexual abuse, the Court noted that the term appeared synonymous with other terms used to describe “varying behavioral traits of those who have been sexually traumatized.” 855 S.W.2d at 561 n.1.

State v. Anderson, 880 S.W.2d 720, 730 (Tenn. Crim. App. 1994). Later opinions are consistent with this interpretation.

The Tennessee Supreme Court has since described *Ballard* as excluding a specific category of expert testimony and as holding that “expert testimony concerning symptoms of post-traumatic stress syndrome exhibited by victims of child abuse was inadmissible.” *Coley*, 32 S.W.3d at 834. The Court further described the problem in *Ballard* as “testimony of a general nature designed to affect the juror’s decision on the credibility of witnesses. . . [that] solicits the danger of undue prejudice or confusing the issues or misleading the jury.” *Coley*, 32 S.W.3d at 835, quoting *Ballard*, 855 S.W.2d at 561.

In *State v. Lacy*, 983 S.W.2d 686, 695 (Tenn. 1998), a case involving a conviction for first degree murder by aggravated child abuse, the Supreme Court held the trial court properly admitted the testimony of a medical doctor about the injuries a child sustained and the expert’s opinion as to the cause of those injuries. Although the Court distinguished that testimony from the kind prohibited in *Ballard* because the expert did not testify as to the child’s behavior, we think another distinction also exists. In *Lacy*, the medical expert had knowledge of the injuries to the child involved and did not testify in general as to injuries commonly suffered by abuse victims. Logically, a mental health professional who treated an alleged child abuse victim should also be allowed to testify as to the mental health injuries sustained by the child and the likely cause of such injuries, based on the same reasoning used in *Lacy*. In fact, one definition of severe child abuse requires expert testimony as to the mental health effects of specific acts toward the child. Tenn. Code Ann. § 37-1-102(b)(21)(B).

We also note that in *Nash-Putnam v. McCloud*, 921 S.W.2d 170 (Tenn. 1996), a termination of parental rights case, the court found significant clear and convincing evidence that the child at issue had suffered severe trauma as a result of physical abuse, “the psychological effects of which have been deep and persistent.” 921 S.W.2d at 175. The evidence of the psychological effects apparently came from a clinical psychologist. Thus, a mental health expert can testify as to the psychological effects of abuse on a particular child. *See also* Tenn. Code Ann. § 37-1-102(b)(21)(B) (defining severe abuse in terms of specific psychological problems that have resulted, or can reasonably be expected to result, from specific brutality, abuse, or neglect).

This court regularly reviews cases where severe child abuse, including sexual abuse, is at issue, and those cases routinely include testimony from psychiatrists, psychologists, therapists, and counselors who have evaluated or treated the children who allegedly suffered the abuse. Quite appropriately, DCS refers such children for evaluation and, depending on the outcome, necessary treatment. DCS often bases its decisions on how to proceed, at least in part, on the findings and recommendations of these experts. In termination of parental rights or dependency and neglect proceedings, DCS generally introduces testimony from these experts.

Despite the regularity with which such testimony is received in these cases, we have found only one other situation where a *Ballard*-based objection was discussed in the appellate opinion. *See In the Matter of S.M.C. and J.L.C.* No. 01A01-9807-JV-00358, 1999 WL 378742 (Tenn. Ct. App.

June 11, 1999), a case cited by the parties herein.

In that case, this court characterized *Ballard* as holding that in a criminal trial expert testimony about “children’s psychological symptoms” cannot be used to prove that sexual abuse caused those symptoms. *Id.* at *5. While we think this statement describes a broader prohibition than the holding in *Ballard*, we agree with the court’s other statement that in *Ballard* the Tennessee Supreme Court held that expert testimony that children exhibit symptoms or characteristics of post traumatic stress syndrome cannot suffice to prove the fact of sexual abuse and that such testimony was inadmissible for that purpose. *Id.*

In *In the Matter of S.M.C.*, this court did not explicitly state that *Ballard* applied in a civil proceeding. Nonetheless, that holding must be implied because the court found that the admission of behavior evidence in that case did not violate *Ballard*. The basis for this conclusion was the fact that DCS had not asked any witnesses with specialized knowledge to ascribe the cause of the child’s symptoms to sexual abuse. Instead, the causation questions were asked by counsel for the parents on cross-examination.

Although *Ballard* specifically limited its major holdings to the context of a criminal trial before a jury, we do not think it can be said that the *Ballard* strictures do not apply in a dependency and neglect or termination of parental rights proceeding based upon allegations of severe child abuse by sexual abuse. We reach that conclusion because in *Coley* the Court described *Ballard* as holding that a specific category of expert testimony is inadmissible. Rather, we believe that the holdings of *Ballard* must be read and applied in the context of the type of civil proceeding before us, recognizing the differences in light of the concerns addressed in *Ballard*. It is also necessary to examine the exact testimony at issue to determine its similarity, in purpose and content, to that found inadmissible in *Ballard*.

Parents’ briefs argue that proof of the children’s sexualized behaviors should not have been admitted “as proof that abuse occurred and/or that the children suffer from post-traumatic stress syndrome.”²¹ Although this statement is broad, the only testimony objected to is contained in the depositions of Drs. Schmits and Sanger, even though a number of witnesses, including lay witnesses, described the children’s behavior. Additionally, Dr. Schmits treated only J.J.S, and Dr. Sanger saw only A.S.

The briefs do not point out the specific testimony of Dr. Schmits that allegedly violates *Ballard*. Instead, they refer to a motion in limine filed before trial seeking to exclude Dr. Schmits’s deposition.²² We have reviewed the specific testimony listed in the motion, which described the objectionable testimony as the psychiatrist’s “diagnosis of post-traumatic stress syndrome for this

²¹In his brief, Father insists that the trial court placed great weight on the behavior of the children, quoting from the court’s ruling.

²²The trial court never explicitly ruled on the motion in limine, and the deposition was submitted in evidence in its entirety. The trial court was free to decline to consider any portions thereof.

child, as related to the allegations of sexual abuse against the child's parents."

Several of Parents' objections were to Dr. Schmits's statement of his initial and final diagnosis of J.J.S.: psychotic disorder, not otherwise specified, and post-traumatic stress disorder and to explanation of those disorders.²³ Testimony from the treating psychiatrist as to the child's diagnosis, even where that diagnosis includes post traumatic stress disorder, is not the type of generalized testimony excluded by *Ballard*.

Mother's lawyer asked Dr. Schmits whether there were any traumatic stressors in J.J.S.'s life, other than the sexual abuse by Father, that could have caused the disorder. Dr. Schmits answered that he thought the abuse was the acute stress that J.J.S. was focused on at the time, but that the other stress of just not having a sense of security in the home situation was also a problem for J.J.S. The children's guardian ad litem asked a similar question about post traumatic stress disorder, having the psychiatrist affirm that a wide range of factors could bring about the disorder. When asked if he was surprised that J.J.S. had this disorder given his history, as related by the child, Dr. Schmits answered no. When asked his opinion whether this history (of abuse) helped cause the disorder, Dr. Schmits answered yes. The guardian ad litem also asked the witness whether the fact that J.J.S. believed he had been abused was one of the factors contributing to post traumatic stress disorder, and Dr. Schmits answered yes.

Taken as a whole, Dr. Schmits's testimony described J.J.S.'s psychiatric condition, his treatment for those conditions, his progress while hospitalized and in the residential treatment program, and his prognosis, including the need for continuing mental health services. His only testimony about sexualized behavior by J.J.S. was that he acted sexually inappropriately on only one or two occasions, giving no details, but that his overall behavior did not show a great deal of sexually acting out. Consequently, to the extent the parents object to Dr. Schmits's testimony about sexualized behaviors, as the brief indicates, we find nothing in the deposition that fits that characterization.

Dr. Schmits testified that a psychotic disorder could have a wide variety of causes and that in J.J.S.'s case one cause could not necessarily be pinpointed. He similarly testified that post-traumatic stress disorder can also be caused by a wide range of factors. Dr. Schmits testified that he believed J.J.S. was abused because J.J.S. talked about the abuse.

Although Parents did not specifically object to it at the deposition, in the motion in limine, or in their briefs, there was another line of questioning that we feel compelled to discuss. The DCS lawyer asked Dr. Schmits whether, in his professional opinion, the abuse J.J.S. described could reasonably be expected to produce severe psychosis, severe neurotic disorder, severe depression, severe developmental delays or retardation, or severe impairment of the child's ability to function

²³Dr. Schmits gave the following relevant definition: "Post-traumatic stress disorder is more of an anxiety type disorder that occurs after trauma and reaction to trauma, whereby a person has anxiety or fears of being hurt; has flashbacks of past physical trauma or abuse."

in the child's environment. Dr. Schmits answered that it could. When asked whether J.J.S. actually suffered from those impairments, Dr. Schmits responded yes to all but depression. The attorney was clearly, as she noted, quoting from statute, Tenn. Code Ann. § 37-1-102(b)(21)(B). We cannot conclude that this testimony was inadmissible since the statute requires that this type of severe child abuse be proved by expert opinion.

In summary, we find that the testimony of Dr. Schmits that Parents object to and that was not elicited by counsel for Parents does not run afoul of *Ballard*. It was not testimony about generalized symptoms of post-traumatic stress syndrome; it was a diagnosis of that disorder as to this child by his treating psychiatrist. The testimony did not seek to establish the fact of abuse through reference to a general list of symptoms that could result from other types of stresses. Dr. Schmits testified about his diagnosis and treatment of his patient, J.J.S.

With regard to Dr. Sanger, Parents filed a joint objection to admission of deposition testimony that specifically objected to identified portions of Dr. Sanger's testimony because the "hearsay statements concerning the child's sexualized behaviors violate *State v. Ballard*." Dr. Sanger evaluated A.S. after the referral by DCS. In the course of that evaluation, she talked with Ms. Cottles and recorded some of the foster mother's observations of A.S.'s behavior and general emotional status. Dr. Sanger referred to these observations in her testimony, and the ones involving sexualized behavior are the basis for many of the objections. We note that Ms. Cottles testified to the same events and behaviors and Parents have not argued that testimony was erroneously allowed. Dr. Sanger also reviewed reports from Carol Wilson's and Dr. Nelson's examinations and Mr. Player's interviews, and relied on some information from those. Again, that testimony appears elsewhere in the record.

Dr. Sanger testified that some of the behaviors were unusual for a five year old child and, therefore, more concerning. She stated these behaviors were more typical of children who experience or witness some type of adult sexual activity.

Dr. Sanger felt there were enough facts in the whole picture, including her evaluation results with A.S., to cause her concern that A.S. had been sexually abused and to cause her to recommend that A.S. not have contact with Father, that Father undergo a psychosexual evaluation, that Mother have visits with close supervision because of statements she made during visits that distressed the children, that A.S. receive counseling to deal with her emotional and behavioral difficulties, and that A.S. receive a speech and language evaluation.

When asked whether there were any psychological evaluation tools that can definitely determine whether or not a child has been sexually abused, Dr. Sanger replied no. She affirmed that it was accepted practice in her profession to look at the child's behaviors and statements and collateral information to determine if there were significant concerns about sexual abuse. When asked whether A.S.'s behavior was consistent with a child who is a victim of sexual abuse, Dr. Sanger stated:

I'm pausing because sexually abused children exhibit such a wide variety of behavior, and I think how I would put that is that her sexualized behavior was not typical for a child her age and would make me conclude that she has witnessed or experienced some other types of activities that would explain her sexualized conduct.

Thus, Dr. Sanger did not testify that A.S. had been sexually abused by Father. Rather, she concluded that precautionary measures were necessary while further investigation proceeded. Our review of the entirety of Dr. Sanger's testimony demonstrates that she did not testify generally about symptoms of a psychological disorder that could be caused by sexual abuse but could also be caused by other stressors. Instead, she testified about specific behaviors of the child she was asked to evaluate and about other evaluation tools she used. We find nothing in *Ballard* that would preclude such testimony. Further, Dr. Sanger did not testify that any psychological symptom or group of symptoms indicated sexual abuse. Instead, she testified that the entirety of the information she had, including the sexualized behavior of A.S., led her to conclude that A.S. had witnessed or experienced adult sexual conduct. Again, we do not find that *Ballard* prohibits such testimony.²⁴

²⁴Even if some portion of the testimony were found to be inadmissible on the basis of *Ballard*, we conclude its mere admission in this bench trial does not justify reversal of the trial court's judgment. Whether or not a trial court's decision on the admission of evidence was erroneous is only one of the questions to be determined on appeal; a separate inquiry is whether any error requires reversal. *Blackburn v. Murphy*, 737 S.W.2d 529, 533 (Tenn. 1987); *White v. Vanderbilt University*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). A judgment should be set aside only if, considering the record as a whole, an error involving a substantial right more probably than not affected the outcome of the trial or would result in prejudice to the judicial process. Tenn. R. App. P. 36(b); *Blackburn*, 737 S.W.2d at 533-34; *Scott v. Jones Bros. Constr.*, 960 S.W.2d 589, 593 (Tenn. Ct. App. 1997); *Pankow v. Mitchell*, 737 S.W.2d 293, 297 (Tenn. Ct. App. 1987). Even if a trial court improperly admits expert evidence, reversal of the judgment is not required if that evidence did not affect the outcome of the trial. *Moss v. Golden Rule Life Insurance Co.*, 724 S.W.2d 367 (Tenn. Ct. App. 1987); see also *White*, 21 S.W.3d at 223 (the erroneous exclusion of expert testimony will not require reversal if the evidence would not have affected the outcome had it been admitted). On appeal, the burden to show prejudice, harm, or that the admitted evidence affected the judgment is on the complaining party. *Coakley v. Daniels*, 840 S.W.2d 367, 371 (Tenn. Ct. App. 1992); *Bishop v. R.E.B. Equipment Serv., Inc.*, 735 S.W.2d 449, 451 (Tenn. Ct. App. 1987). Any allegations of error should be evaluated in light of the entire record. *State v. Henning*, 975 S.W.2d 290, (Tenn. 1998).

Where the judgment is the product of a bench trial, the likelihood of harm from erroneously admitted evidence is less than where a jury is involved, because the trial court is well qualified to decide what weight, if any, should be given to the evidence. *Castelli v. Lien*, 910 S.W.2d 420, 426 (Tenn. Ct. App. 1995). Where the case is tried to a judge, an error in admission of evidence can be corrected by the judge declining to consider it after further reflection. Where the record from a bench trial does not suggest that the trial court considered or relied upon the challenged evidence in reaching its decision, it is unlikely the complaining party can show that the admission of the evidence affected the judgment. *Swafford v. City of Chattanooga*, 743 S.W.2d 174, 177 (Tenn. Ct. App. 1987); see also *Coakley*, 840 S.W.2d at 371 (holding that the appellant failed to carry his appellate burden of showing that the evidence he objected to that was admitted in a bench trial "inflamed the passions of the trial judge.") In this case, the trial court did not mention in its judgment the testimony of either Dr. Sanger or Dr. Schmits, although the court explicitly pointed out other evidence and witnesses it found persuasive. The testimony regarding the children's sexualized behavior was introduced through a number of witnesses, so its repetition in the experts' depositions could not be said to have affected the outcome. Parents have failed to show that, in light of the entire record, any error in the admission of specified portions of the experts' depositions affected the outcome of the case.

CONCLUSION

We agree with the trial court's determination that DCS proved by clear and convincing evidence that the children were dependent and neglected and victims of severe child abuse at the hands of both parents, M.S. and J.S. Accordingly, we affirm the judgment of the trial court. Costs of this appeal are taxed to the appellants.

PATRICIA J. COTTRELL, JUDGE